



**BILLING CODE 3510-22-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 660**

**[Docket No. 160126053-6053-01]**

**RIN 0648-BF74**

**Magnuson-Stevens Act Provisions; Fisheries off West Coast States; Pacific Coast Groundfish Fishery; 2016 Tribal Fishery for Pacific Whiting**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS issues this proposed rule for the 2016 Pacific whiting fishery under the authority of the Pacific Coast Groundfish Fishery Management Plan (FMP), the Magnuson Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and the Pacific Whiting Act of 2006. This proposed rule would allocate 17.5% of the U.S. Total Allowable Catch of Pacific whiting for 2016 to Pacific Coast Indian tribes that have a Treaty right to harvest groundfish.

**DATES:** Comments on this proposed rule must be received no later than *[Insert date 30 days after date of publication in the FEDERAL REGISTER]*.

**ADDRESSES:** You may submit comments on this document, identified by NOAA-NMFS-2016-0009, by any of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal eRulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0009*, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.

- Mail: William W. Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115-0070, Attn: Miako Ushio.

*Instructions:* Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

**FOR FURTHER INFORMATION CONTACT:** Miako Ushio (West Coast Region, NMFS), phone: 206-526-4644, and e-mail: *miako.ushio@noaa.gov*.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

This proposed rule is accessible via the Internet at the Office of the **Federal Register** Web site at <https://www.federalregister.gov>. Background information and documents are available at the NMFS West Coast Region Web site at [http://www.westcoast.fisheries.noaa.gov/fisheries/management/whiting/pacific\\_whiting.html](http://www.westcoast.fisheries.noaa.gov/fisheries/management/whiting/pacific_whiting.html) and at the Pacific Fishery Management Council's website at <http://www.pcouncil.org/>.

**Background**

The regulations at 50 CFR 660.50(d) establish the process by which the tribes with treaty fishing rights in the area covered by the Pacific Coast Groundfish Fishery Management Plan (FMP) request new allocations or regulations specific to the tribes, in writing, during the biennial harvest specifications and management measures process. The regulations state that the Secretary will develop tribal allocations and regulations in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus. The procedures NMFS employs in implementing tribal treaty rights under the FMP were designed to provide a framework process by which NMFS can accommodate tribal

treaty rights by setting aside appropriate amounts of fish in conjunction with the Pacific Fishery Management Council (Council) process for determining harvest specifications and management measures.

Since the FMP has been in place, NMFS has been allocating a portion of the U.S. total allowable catch (TAC) (called Optimum Yield (OY) or Annual Catch Limit (ACL) prior to 2012) of Pacific whiting to the tribal fishery, following the process established in 50 CFR 660.50(d). The tribal allocation is subtracted from the U.S. Pacific whiting TAC before allocation to the non-tribal sectors.

There are four tribes that can participate in the tribal whiting fishery: the Hoh Tribe, the Makah Tribe, the Quileute Tribe, and the Quinault Indian Nation (collectively, the "Treaty Tribes"). The Hoh Tribe has not expressed an interest in participating to date. The Quileute Tribe and Quinault Indian Nation have expressed interest in participating in the whiting fishery. However, to date, only the Makah Tribe has prosecuted a tribal fishery for Pacific whiting. They have harvested whiting since 1996 using midwater trawl gear. Tribal allocations have been based on discussions with the Treaty Tribes regarding their intent for those fishing years. Table 1 below provides a history of U.S. OYs and annual tribal allocation in metric tons (mt).

**Table 1. U.S. Optimum Yields (OYs) and Annual Tribal Allocation  
in Metric Tons (mt) .**

<u>Year</u>	<u>U.S. OY</u>	<u>Tribal Allocation</u>
2006	269,069 mt	32,500 mt
2007	242,591 mt	35,000 mt
2008	269,545 mt	35,000 mt
2009	135,939 mt	50,000 mt
2010	193,935 mt	49,939 mt
2011	290,903 mt	66,908 mt
2012	186,037 mt TAC <sup>1</sup>	48,556 mt
2013	269,745 mt TAC	63,205 mt
2014	316,206 mt TAC	55,336 mt
2015	325,072 mt TAC	56,888 mt

<sup>1</sup> Beginning in 2012, the United States started using the term Total Allowable Catch, based on the Agreement between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting.

In 2009, NMFS, the states of Washington and Oregon, and the Treaty Tribes started a process to determine the long-term tribal allocation for Pacific whiting; however, no long-term allocation has been determined. In order to ensure Treaty Tribes continue to receive allocations, this rule proposes the 2016 tribal allocation of Pacific whiting. This is an interim allocation not intended to set precedent for future allocations.

#### **Tribal Allocation for 2016**

In exchanges between NMFS and the Treaty Tribes during 2015, the Makah Tribe indicated their intent to participate in the tribal whiting fishery in 2016. The Makah Tribe has requested 17.5% of the U.S. TAC. The Quileute Tribe and the Quinault Indian Nation indicated that they are not planning to participate in 2016. NMFS proposes a tribal allocation that accommodates the Makah request, specifically 17.5% of the U.S. TAC. NMFS believes that the current scientific information regarding the distribution and abundance of the coastal Pacific whiting stock suggests that 17.5% is within the range of the tribal treaty right to Pacific whiting.

The Joint Management Committee, which was established pursuant to the Agreement between the United States and Canada on Pacific Hake/Whiting (the Agreement), is anticipated to recommend the coastwide and corresponding U.S./Canada TACs no later than March 25, 2016. The U.S. TAC is 73.88% of the coastwide TAC. Until this TAC is set, NMFS cannot propose a specific amount for the tribal allocation. The whiting fishery typically begins in May, and the final rule establishing the whiting specifications for 2016 is anticipated to be published by early May. Therefore, in order to provide for public input on the tribal allocation, NMFS is issuing this proposed rule without the final 2016 TAC. However, to provide a basis for public input, NMFS is describing a range of potential tribal

allocations in this proposed rule, applying the proposed approach to determining the tribal allocation to a range of potential TACs derived from historical experience.

In order to project a range of potential tribal allocations for 2016, NMFS is applying its proposed approach to determining the tribal allocation to the range of U.S. TACs over the last 10 years, 2006 through 2015 (plus or minus 25% to capture variability in stock abundance). The range of TACs in that time period was 135,939 mt (2009) to 325,072 mt (2015). Applying the 25% variability results in a range of potential TACs of 101,954 mt to 406,340 mt for 2016. Therefore, using the proposed allocation rate of 17.5%, the potential range of the tribal allocation for 2016 would be between 17,842 and 71,110 mt.

This proposed rule would be implemented under authority of Section 305(d) of the Magnuson-Stevens Act, which gives the Secretary responsibility to "carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this Act." With this proposed rule, NMFS, acting on behalf of the Secretary, would ensure that the FMP is implemented in a manner consistent with treaty rights of four Northwest Tribes to fish in their "usual and accustomed grounds and stations" in common with non-tribal citizens. *United States v. Washington*, 384 F. Supp. 313 (W.D. 1974).

#### **Classification**

NMFS has preliminarily determined that the management measures for the 2016 Pacific whiting tribal fishery are consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. In making the final determination, NMFS will take into account the data, views, and comments received during the comment period.

The Office of Management and Budget has determined that this proposed rule is not significant for purposes of Executive Order 12866.

As required by section 603 of the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was prepared. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A summary of the analysis follows. A copy of this analysis is available from NMFS.

Under the RFA, the term "small entities" includes small businesses, small organizations, and small governmental jurisdictions. The Small Business Administration (SBA) has established size criteria for entities involved in the fishing industry. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts, not in excess of \$20.5 million for all its affiliated operations worldwide (See 79 FR



33647; June 12, 2014). For marinas and charter/party boats, a small business now defined as one with annual receipts, not in excess of \$7.5 million. For purposes of rulemaking, NMFS is applying the \$20.5 million standard to catcher processors (C/Ps) because Pacific whiting C/Ps are involved in the commercial harvest of finfish. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide. Effective February 26, 2016, a seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 750 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide (See NAICS 311710 at 81 FR 4469; January 26, 2016).

*Small organizations.* The RFA defines small organizations as any nonprofit enterprise that is independently owned and operated and is not dominant in its field.

*Small governmental jurisdictions.* The RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000.

This proposed rule would allocate 17.5% of the U.S. Total Allowable Catch of Pacific whiting for 2016 to Pacific Coast Indian tribes that have a Treaty right to harvest groundfish.

This allocation percentage was used for the 2015 fishery. The entities that this rule directly impacts are the Makah Tribe and the following in the non-tribal fisheries: Quota share (QS) holders in the Shorebased Individual Fishing Quota (IFQ) Program-Trawl Fishery; vessels in the Mothership Coop (MS) Program-Whiting At-sea Trawl Fishery; and the C/P Coop Whiting At-sea Trawl Fishery. These entities determine how much of their allocations are to be actually fished and what vessels are allowed to fish their allocations. This rule proposes to allocate fish to the Makah Tribe. Based on groundfish ex-vessel revenues and on tribal enrollments (the population size of each tribe), the Makah Tribe is considered a small entity.

Currently, the Shorebased IFQ Program is composed of 172 Quota Share permits/accounts, 152 vessel accounts, and 44 first receivers. The MS fishery is currently composed of a single coop, with six mothership processor permits, and 34 Mothership/Catcher-Vessel (MS/CV) endorsed permits, with three permits each having two catch history assignments. The C/P Program is composed of 10 C/P permits owned by three companies that have formed a single co-op. Many companies participate in two sectors and some participate in all three sectors. All of the 34 mothership catch history assignments are associated with a single mothership co-op and all ten of the catcher-processor permits are associated with a co-op. These co-ops are considered

large entities from several perspectives; they have participants that are large entities, whiting co-op revenues exceed or have exceeded the \$20.5 million, or co-op members are connected to American Fishing Act permits or co-ops where the NMFS Alaska Region has determined they are all large entities (79 FR 54597; September 12, 2014). After accounting for cross participation, multiple QS account holders, and affiliation through ownership, NMFS estimates that there are 103 non-tribal entities directly affected by these proposed regulations, 89 of which are considered "small" businesses.

For the years 2011 to 2015, the total whiting fishery (tribal and non-tribal) averaged harvests of approximately 205,000 mt annually, worth over \$52 million in ex-vessel revenues. As the U.S. whiting TAC has been highly variable during this time, so have harvests. In the past five years, harvests have ranged from 160,000 mt (2012) to 264,000 mt (2014). Ex-vessel revenues have also varied in the same period, with annual ex-vessel revenues ranging from \$25 million (2015) to \$65 million (2013 and 2014). Total whiting harvest in 2015 was approximately 151,000 mt worth \$25 million, at an ex-vessel price of \$167 per mt. In 2014, harvest was 264,000 tons, and ex-vessel revenues were over \$64 million with an average ex-vessel price of \$240 per mt. The prices for whiting are largely determined by the world market for groundfish, because most of

the whiting harvested is exported. Poor world market conditions led to a decrease in prices in 2015. There was no tribal catch of Pacific whiting in 2015, and overall, a lower percentage of the commercial TAC was harvested than in prior years.

The use of ex-vessel values does not take into account the wholesale or export value of the fishery, or the costs of harvesting and processing whiting into a finished product. The latest available economic data indicates that in 2012, motherships received \$30.3 million in wholesale revenue, C/Ps received \$51 million, and shoreside processors \$55 million. The Pacific whiting fishery harvests almost exclusively Pacific whiting. While bycatch of other species occurs, the fishery is constrained by bycatch limits on key overfished species. This is a high-volume fishery with low ex-vessel prices per pound. This fishery also has seasonal aspects based on the distribution of whiting off the west coast.

Since 1996, there has been a tribal allocation of the U.S. Pacific whiting TAC. Tribal fisheries undertake a mixture of fishing activities that are similar to the activities that non-tribal fisheries undertake. Tribal harvests have been delivered to both shoreside plants and at-sea processors. These processing facilities also process fish harvested by non-tribal fisheries.

This proposed rule would allocate 17.5% of Pacific whiting to the tribal fishery, and would ultimately determine how much

is left for allocation to the non-tribal sectors. The amount of whiting allocated to both the tribal and non-tribal sectors is based on the U.S. TAC. From the U.S. TAC, small amounts of whiting that account for research catch and for bycatch in other fisheries are deducted. The amount of the tribal allocation is also deducted directly from the TAC. After accounting for these deductions, the remainder is the commercial harvest guideline. This guideline is then allocated among the three non-tribal sectors as follows: 34 percent for the C/P Coop Program; 24 percent for the MS Coop Program; and 42 percent for the Shorebased IFQ Program.

The effect of the tribal allocation on non-tribal fisheries will depend on the level of tribal harvests relative to their allocation and the reapportioning process. Total whiting harvest in 2015 was approximately 151,000 mt worth \$25 million, at an ex-vessel price of \$167 per mt. Assuming a similar TAC and ex-vessel price in 2016, if the Treaty Tribes were to harvest 17.5%, the approximate value of that harvest would be \$4.4 million. If the Treaty Tribes do not harvest their entire allocation, there are opportunities during the year to reapportion unharvested tribal amounts to the non-tribal fleets. For example, in 2015, NMFS executed one such reapportionment. The best available information through September 14, 2015, indicated that at least 30,000 mt of the tribal allocation would

not be harvested by December 31, 2015. To allow for full utilization the resource, NMFS reapportioned 30,000 mt on September 16, 2015, to the Shorebased IFQ Program, C/P Coop and MS Coop in proportion to each sector's original allocation. Reapportioning this amount was expected to allow for greater attainment of the TAC while not limiting tribal harvest opportunities for the remainder of the year. The revised Pacific whiting allocations for 2015 following the reapportionment were: Tribal 26,888 mt; C/P Coop 100,873 mt; MS Coop 71,204 mt; and Shorebased IFQ Program 214,607 mt.

NMFS considered two alternatives for this action: the "No-Action" and the "Proposed Action." NMFS did not consider a broader range of alternatives to the proposed allocation. The tribal allocation is based primarily on the requests of the tribes. These requests reflect the level of participation in the fishery that will allow them to exercise their treaty right to fish for whiting. Under the Proposed Action alternative, NMFS proposes to set the tribal allocation percentage at 17.5%, as requested by the tribes. This would yield a tribal allocation of between 17,842 and 71,110 mt for 2016. Consideration of a percentage lower than the tribal request of 17.5% is not appropriate in this instance. As a matter of policy, NMFS has historically supported the harvest levels requested by the tribes. Based on the information available to NMFS, the tribal

request is within their tribal treaty rights. A higher percentage would arguably also be within the scope of the treaty right. However, a higher percentage would unnecessarily limit the non-tribal fishery.

Under the No-Action alternative, NMFS would not make an allocation to the tribal sector. This alternative was considered, but the regulatory framework provides for a tribal allocation on an annual basis only. Therefore, the no-action alternative would result in no allocation of Pacific whiting to the tribal sector in 2016, which would be inconsistent with NMFS' responsibility to manage the fishery consistent with the tribes' treaty rights. Given that there is a tribal request for allocation in 2016, this alternative received no further consideration.

NMFS believes this proposed rule would not adversely affect small entities. The reapportioning process allows unharvested tribal allocations of whiting, fished by small entities, to be fished by the non-tribal fleets, benefitting both large and small entities. Nonetheless, NMFS has prepared an IRFA and is requesting comments on this conclusion. SEE ADDRESSES.

There are no reporting, recordkeeping or other compliance requirements in the proposed rule.

No Federal rules have been identified that duplicate, overlap, or conflict with this action.

Pursuant to Executive Order 13175, this proposed rule was developed after meaningful consultation and collaboration with tribal officials from the area covered by the FMP. Consistent with the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Council is a representative of an Indian tribe with federally recognized fishing rights from the area of the Council's jurisdiction. In addition, NMFS has coordinated specifically with the tribes interested in the whiting fishery regarding the issues addressed by this rule.

**List of Subjects in 50 CFR Part 660**

Fisheries, Fishing, Indian Fisheries.

Dated: March 3, 2016

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Samuel D. Rauch III,  
Deputy Assistant Administrator for Regulatory Programs,  
National Marine Fisheries Service.



For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

**PART 660--FISHERIES OFF WEST COAST STATES**

1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.* and 16 U.S.C. 773 *et seq.*, and 16 U.S.C. 7001 *et seq.*

2. In § 660.50, revise paragraph (f)(4) to read as follows:

**§ 660.50 Pacific Coast treaty Indian fisheries.**

\* \* \* \* \*

(f) \* \* \*

(4) *Pacific whiting*. The tribal allocation for 2016 will be 17.5% of the U.S. TAC.

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